No. 5901.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Wm. H. Moore, Jr., Trustee in Bankruptcy for the Estate of Abe Silverstein,

Appellant,

vs.

Abe Silverstein,

Appellee.

BRIEF OF APPELLEE.

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STATEMENT OF FACTS.

At the outset we are obliged to take issue with the appellant on some of his statements of fact. The statement that "Max," whose real name is "Matt" Silverstein, "opened negotiations with the creditors of the bankrupt, seeking an extension of time for the bankrupt in payment of his debts" is entirely unsupported by and contradictory to the evidence. On page 67 of the transcript appears the testimony of Matt Silverstein, which is as follows:

"No, I did not have anything to do with the negotiation of the extension, only to help out in the busi-

ness. Yes sir, I did not come into it until the Board of Trade had taken it from him, then I tried to help him."

Neither the bankrupt nor his brother had any negotiations whatsoever with the Board of Trade until the assignment had been made, and the only negotiations then were for the repurchase of the stock and fixtures, and no extension was ever requested or granted. The assignment to the Board of Trade was a purely voluntary one made by the bankrupt at the suggestion of certain of his creditors who were members of the Board of Trade, and also at the request of the Board of Trade. This assignment was made without any release and in an honest effort of the bankrupt to do everything to assist his creditors.

The appellant is again in error when he says the offer was made to purchase the merchandise back from the Board of Trade for sixty cents on the dollar. The testimony of Matt Silverstein was that his first offer was for the merchandise only, at sixty cents on the dollar, and that he changed this offer to include the fixtures and offered to pay one hundred cents on the dollar for the stock and fixtures as inventoried by the Board of Trade, the amount thereof being about $19,000.00; that he offered to pay a few thousand dollars cash and to guarantee the payments and also to secure the endorsement of another brother who was responsible. [Tr. of R., p. 67.

There is other testimony to the effect that Matt Silverstein was known to a majority of the creditors of the bankrupt and was himself doing business with and ob-

taining credit from them and that he was an entirely responsible business man.

Counsel is again in error when he says that the stock and fixtures were sold to one Stein, as the evidence showed that Stein was only the nominal purchaser and was acting as a go-between for J. D. Kaufman, who was the real purchaser, and who was the owner of the stock at the time of the hearing. Mr. Kaufman was one of the men employed by the Board of Trade to take the inventory and this will be referred to later.

Counsel, in stating the specifications of objections, does not state the facts of the case, but states the claims of the trustee which the court found to be untrue. As will be more fully discussed later on, there was no actual or any shortage, and the finding of the court to that effect was amply supported by the evidence.

We desire very vehemently to take issue with a statement of counsel for the appellant that "the referee's report seemed to be based on the premise that an opposition to a discharge in bankruptcy was in the nature of a criminal proceeding and that the bankrupt was entitled to the benefit of a reasonable doubt." It is true that the referee made the statement which appears on page 70 of the transcript of record, but this does not in any way affect the decision in the case, or the evidence or the amount of evidence, nor the burden thereof. We will go into this again in answering the arguments of the appellant. Furthermore, appellant upon the hearing in the District Court, and in his briefs filed in the District Court again and again quoted the statement of the referee and complained bitterly thereof. The District Court was

furnished with a transcript of all of the evidence taken in the case and assisted by voluminous briefs quoting most of the evidence, and the District Court, after reviewing all of the evidence, decided against the appellant on all points raised, and held that the evidence supported the findings of the referee and that the bankrupt had satisfactorily carried the burden where the law casts the burden upon him, and satisfactorily explained all matters complained of by the trustee in his objections to the discharge.

ARGUMENT.

First Specification of Error.

At the outset of the argument we desire to call the court's attention to a few rules of evidence which the appellant has entirely overlooked and ignored, and which rules are elementary, and defeat each and every argument made by the appellant in his entire brief.

1. That where an issue of fact is to be tried and the trial is by the court without a jury, the court sits in the place of the jury and where the evidence is conflicting the decision of the court as to which of such conflicting evidence shall be accepted as the truth, is final and conclusive and binding upon the parties upon appeal.

2. That findings of fact will not be disturbed on appeal where there is evidence to support those findings and even though the appellate court might from the same evidence have made different findings the findings cannot be overruled unless the Appellate Court can say as a matter of law that the findings are without support in the evidence.

3. The right to a discharge in bankruptcy is addressed to the sound discretion of the District Court with the exercise of which, except in case of *gross abuse* (italics ours) the Appellate Court will not interfere. (Matter of Merritt, C. C. A. 9th Circuit, 28 Fed. (2d) 679; Frank M. Parrish v. City National Bank, C. C. A. 8th Circuit, 32 Fed. (2d) 982); citing:

4 Fed. (2d) 195;
14 Fed. (2d) 523;
18 Fed. (2d) 200.

The entire complaint made by the appellant in his first assignment of error, which was also Exception No. 1 made by the trustee in his exceptions to the report of the Special Master, is based upon the alleged claim of shrinkage or shortage. This shrinkage or shortage was based entirely upon the testimony of the auditor employed by the Board of Trade and who was not acting under or by virtue of any authority of the bankruptcy court. This auditor, Mr. Namson, based his entire testimony and his entire claim of shortage upon the inventory taken by the Los Angeles Wholesalers' Board of Trade, the assignee for the benefit of creditors, after the bankrupt had made the assignment, and taken in the absence of the bankrupt, but counsel entirely overlooks the fact that the Special Master did not accept the testimony of Mr. Namson and that his testimony was directly contradicted by the bankrupt, and by the further testimony that the inventory was false and untrue and incorrect and that a great portion of it had been taken by Mr. J. D. Kaufman, who at the time of taking it was negotiating for the purchase of the stock and fixtures and who did

purchase it in the names of the intermediaries, Krause and Stein. Let us briefly review the testimony bearing on this point. The witness Namson testified on page 29 of the transcript of record:

> "* * * and we limited ourselves to making up the comparative balance sheet at the end of the year, which we considered to be correct * * *now after they had executed an assignment a physical inventory was taken and the assets found to be as follows * * *."

On cross-examination, page 32 of the transcript of record, Mr. Namson testified that:

> *"It is a fact there is an entry in the books for each check that was given out up until March 13, when the Bankrupt made an assignment to the Board of Trade."* (Italics ours.)
>
> "Q. And up until March 13th, throughout all of his books there are entries there showing the amount of each deposit made in the bank, and the amount of each withdrawal from the bank; is not that true? A. No, it shows daily sales, merchandise received, general expenses and paid bills, but there is no number of the checks, or checks, like you have in these old books; it only shows the amount paid.
>
> "This book, Exhibit I, is made out in the handwriting of the bankrupt and purports to be a transcript or a copy of what appeared in Exhibit II for two months and seven days as far as the sales are concerned and nothing else. Up until the time the bookkeeper left in the month of February, the books seem to have been regularly kept, but I can't say they are accurate without checking them, but they were regularly kept. *They did disclose the condition of the business up until March 13, 1928.* I have not talked to the bankrupt. I realize that it is poor bookkeeping. I used as a basis for my figures in

arriving at the discrepancy the figures given me by the Board of Trade when they took over the business and obtained an inventory. I had the inventory but I did not check the inventory. I took the Board of Trade's figures. I did not assist in taking that inventory. I do not know whether it is right or wrong.

Q. You don't know whether or not those figures on which you based your discrepancy are right or wrong, that is, the figures given to you by the Board of Trade? A. Well, there are only two figures there.

Q. And what are those? A. Cash on hand, $27.57; and the merchandise inventory—the fixtures we take at the same value as he has shown in his books—so, that there are only two figures there; cash on hand, $27.57, and the merchandise inventory.

Q. Assuming that the figures given to you by the Board of Trade, 'Merchandise inventory $18,-115.47,' are not correct, then your figures as to the deficit are not correct; is that right? A. Exactly. (Italics ours.)

Up until the bookkeeper left, the books were kept under a regular double entry system. They were balanced and kept in balance all the time.

Q. And they reflect, do they not, the usual and ordinary transactions all the way through from the time the books were opened in 1924? A. Well, I didn't go back as far as that, but it shows a regular set of books were kept.

Since that time the other book is only a single entry with just a record of transactions that occurred without the detailed information.

Yes, is a record here of merchandise purchased, of the merchandise received, general expenses, bills paid, and daily sales and an inventory."

The bankrupt testified in this connection at page 24, transcript of record, as follows:

> "I paid for more than $3,000 worth of this $26,000 worth of merchandise, I bought between January 1st and March 1st, 1928. I listed all of this merchandise and turned it over to the Board of Trade more than *$20,000 worth of merchandise,* and I paid more than $6,000 including expenses and therefore it shows what the amount was and I haven't taken anything away.
>
> "I kept a bookkeeper as long as I could, as long as business would keep up and when business dropped I kept the book myself to be able to tell my auditor. I let my bookkeeper go in February, 1928."

And again at the final hearing at page 63, transcript of record:

> "I was in the store when it was sold out. I was there when Stein checked over the inventory and he gave me the job of helping check over and I checked with the Board of Trade man. Yes, sir, it was the man that was there from the Board of Trade that morning. His name was Mr. Palmer.
>
> Q. And who else? A. Leo Krause, a partner of Mr. Stein.
>
> It was about 10:30 or 11:00 o'clock. This inventory was then and Mr. Palmer had it, until it was checked, and then I turned it over to Mr. Stein. There was one like this, but I think they were copies. There was a carbon copy there besides the original. I was rechecking, calling back the numbers and amounts of the merchandise, like if Mr. Palmer would say: '10½ dozen B. V. Ds.,' I would go and count the boxes, and each box contains a half dozen, and I found thirty-nine boxes, and that would be 19½ dozen, and I said to Krause: 'You see what you got'? And he said, 'All right,' and we kept on going for some two or three items. I can find that item there now. That item is on page 14, 10½

dozen union suits, B. V. Ds., price $11.75 per dozen. 10½ is the quantity, 10½ dozen. Yes sir, Mr. Palmer first called 10½ and then I counted the boxes to recheck that. That was the only way I could recheck it and I counted them and there were only 39 boxes and there is a half dozen in a box and that should have been 19½ dozen. Mr. Krause was right next to me then. I said, '*You got about 9½ dozen that they didn't count.*' And he says, 'all right.'

After a while we came to a compartment of shoes near the back which was one lot of 11 pairs and next to it was 14 pairs, and they were not listed at all, they were all in the same row, but they were not called at all; and the next 14 were called, and right by it was only 3 pairs that were called. I can find that page on the inventory, that is page 23, item 14, 3 shoes, lot #590, $6.15 a pair. They were Packard shoes in this compartment and next to it were 13 and 14 pairs, but they were not listed at all. Yes sir, I mean that next to the place where the 3 pairs were, there was a compartment containing 14 pairs of shoes that were not in this inventory and they ran $3.90 a pair. I called Mr. Krause's attention to it and he says: 'Well, that is pretty good.' He said to Mr. Palmer: 'The inventory looks pretty good, let's figure up and I will give you a check,' and he was satisfied and waited for Mr. Stein to come back in and bring the certified check. I did not do any more rechecking then. Mr. Krause said: 'It looks all right to me, I am satisfied, and there is no use checking any more.' I said: 'You have got a lot of stuff that there is no checking on it.' He said. 'What is it your business? I am paying you for working here.' I continued working there that day and the next day, and Mr. Kaufman and four of us there in all. Mr. Kaufman came in the following morning and managed the store from that time on. I was there on the day that the inventory was checked and for four or five weeks thereafter. They would take the inventory and sit in the back and talk when I was up in front. I didn't get a chance to do any more checking.

> Q. Did anybody do it? A. Yes, Mr. Krause and Mr. Stein used to go and check every item you see.
>
> Yes, sometimes for certain items I was permitted to see the inventory after that time. *No, I didn't check any more, but if they wanted to find a particular item, I looked it up. If there are any other discrepancies I have no means of knowing it.* The fixtures are listed here in the total amount of $917.30. I can't say exactly what they cost me, but about $1,300." (Italics ours.)

It will thus be seen that the testimony on behalf of the appellant as to the alleged shortage was unsatisfactory, was based upon an incorrect inventory and was sharply contradicted by other evidence. The Special Master and the District Court very properly refused to accept the evidence of the appellant in this connection and accepted as true the testimony of the bankrupt.

The following sections of the Code of Civil Procedure of the state of California amply sustain the ruling of the trial court in this regard. They are as follows:

> "Section 1847: A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility."
>
> "Section 2061: The jury, subject to the control of the court, in the cases specified in this code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions: * * *
>
> 2. That they are not bound to decide in conformity with the declarations of any number of

witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds;

3. That a witness false in one part of his testimony is to be distrusted in others."

The appellant, on page 7 of his brief, claims that the burden of proof shifted, but the burden of proof never shifts. It is always with the affirmative—in this case being the appellant, and remains with him throughout the entire trial. The law on this subject is so clear as to require little citation of authority. However, the rule is clearly and briefly stated in 24 Cal. Jur., at p. 773, as follows:

> "The burden of producing a preponderance of evidence constantly remains with the party having the affirmative of the issue and does not shift from side to side as the case progresses. All that is required of a defendant is the production of evidence sufficient to rebut the effect of plaintiff's showing. He is not required to offset it by a preponderance of the evidence. When all the evidence is in the question for the jury is whether the preponderance is with the plaintiff. Citing Scott v. Wood, 81 Cal. 398; Scarborough v. Ergo, 193 Cal. 341; and Congress has not in any way changed this rule by anything in the Bankruptcy Act. Matter of Merritt, *supra*."

Furthermore, the Special Master insisted upon the bankrupt meeting the issue raised in this regard by the claims and testimony of the trustee and pursuant to the demand of the trustee the bankrupt gave certain testimony and the matter was continued and further evidence on this subject again taken. At the final conclusion of the testimony the Special Master accepted as true the testimony offered by the bankrupt and held that there was

no shortage. This is amply borne out by the record in the case. Shortly before the conclusion of the first hearing the Special Master stated that he would require additional evidence on behalf of the bankrupt before he would hold that the loss claimed by the trustee was satisfactorily explained. The bankrupt then testified that the inventory was not correct and that it had not been taken in good faith. This phase of the case was again gone into at the final hearing and the inventory was successfully impeached and so successfully that the Special Master had no hesitation in saying that he was not at all in doubt about the findings of fact in the matter; that there was no fraud, concealment, shrinkage or shortage. See pages 45, 46, 47, 59, 60, 61, 62, 63, 68 and 69 of the transcript of record.

Appellant complains that the bankrupt was only able to show a discrepancy in two particulars, that is: the omission of 9½ dozen B. V. D. union suits, 14 pairs of shoes and the depreciation of the fixtures. The evidence showed that the bankrupt was prevented from further checking the inventory and therefore was unable to point out any further discrepancies. On pages 64 and 65 of the transcript of record the bankrupt, after testifying to the discrepancies, states that the man who employed him to assist in checking the inventory stopped the work of checking and informed the representative of the Board of Trade, Mr. Palmer, that he did not care to check any more, but would give him a check for the purchase price. Mr. Palmer was present when the discrepancy was found, but made no effort to continue the checking. The bankrupt's testimony in this regard is found on pages

64 and 65 and has just been quoted at length in this brief. Under the circumstances shown the Special Master was perfectly justified in rejecting the inventory and the alleged claim of shortage based upon it.

The appellant states on page 10 of his brief that the Master, in summing up the conclusion of the case, accepted the inventory by the Board of Trade adjusters as correct, but the Special Master merely made this statement for the purposes of argument. He did not accept the inventory as correct, but very positively rejected the inventory and held and found as a fact that there was no shortage.

Counsel claims in his brief that there is no explanation of the sudden purchase of $26,000.00 worth of merchandise, but we cannot help but feel that counsel well knows this statement to be incorrect. On the examination under 21-a, which by stipulation was made a part of the evidence on the objections to the discharge the testimony showed that the bankrupt had taken over two stores where he had previously had only one, and that he was unable to secure a release of the second store from his landlord and therefore decided to stock it with merchandise, so as to assist in carrying on his business and saving the loss occasioned by paying rent on a vacant store. That his creditors were informed of this at the time he purchased the merchandise. That his plan did not work out and that he used various legitimate merchandising means to move the merchandise so as to be able to pay his creditors when their bills became due. A portion of his testimony at the 21-a examination in this regard is found on page 27 of the transcript of record. The trustee in

no way rebutted this testimony of the bankrupt, although he had ample opportunity to do so, if such were possible. Some of the creditors referred to by the bankrupt were present during the hearing, but none of them even attempted to make any denial of the bankrupt's statements in this regard, nor could they have done so, for the bankrupt was telling the truth and the Special Master very properly believed him.

The appellant comments on the credibility of his witnesses, but the Special Master and the District Court were the sole judges of the credibility of the witnesses and the weight to be given their testimony. As has been shown, the testimony of the appellant in regard to the inventory was found to be tainted and untrue and therefore disregarded.

Second Assignment of Error.

The appellant gives much importance to the second assignment of error, but the testimony produced by him thereon fails utterly to make any case whatsoever for the appellant on his claim that the bankrupt failed to keep proper books of account. In the first place the appellant seems utterly at sea as to what are proper books of account. He attempted to claim and would have this court hold that books of account are not proper books of account unless they comply in ever detail with every contrivance known to the highly skilled and technical accounting profession. No such intent on the part of Congress is evidenced by any act ever passed by Congress or by any decision of any court construing the Bankruptcy Act. All that is necessary is for the bankrupt to have kept the ordinary and usual books of account from

which his financial condition might be ascertained. Books of account need not have been kept in the most scientific manner, but may be in any form provided a true condition of the bankrupt's affairs can be gathered from them, but they must show receipts, payments, assets, liabilities and the stock in hand. Brandenburg on Bankruptcy, 1917 Ed. p. 1086; citing *In re* Simon, 201 Fed. 1004; *In re* Bellis, 3 N. B. R. 124; *In re* Solom, 2 N. B. R. 94; *In re* Marcus and Cherris, 203 Fed. 29.

Let us briefly review the evidence in this connection. The bankrupt testified that after his efforts to move the merchandise were unavailing he, for the purpose of protecting the creditors, endeavored to reduce his expenses to the minimum, and as a part of this program discharged the bookkeeper. He stated that he had had no education and was unable to understand the double entry set of books, but was able to keep a single entry set of books from which his financial condition could be ascertained. That previously the bookkeeper had been in the habit of coming in once or twice a month and making the entries in the double set of books from the check stubs and cash register receipts and invoices. That in opening the new set of single entry books he very naturally carried them back to the first of the year so as to be able to ascertain his condition and in transcribing the entries in the double entry set of books he found certain items which were incorrect and in transcribing put in the correct figures. That these errors occurred because the bookkeeper did not always get all of the slips and therefore certain transactions were omitted. That in each and every instance where the amount of receipts was more than shown in the double entry set of books he had actu-

ally received the amount of money accounted for in the single entry system and deposited the same to the account carried by the business in the bank. The present record does not show but the books themselves show that all of the changes were not by way of raising sales, but that one or more changes had been made in the opposite direction.

As to whether or not the books kept by the bankrupt were proper books of account, we will take the testimony of the trustees' own witness, Mr. Namson. He testified (p. 32) as follows:

> "It is a fact there is an entry in the books for each check that was given out up until March 13, when the bankrupt made an assignment to the Board of Trade.
>
> "Q. And up until March 13 throughout all of his books there are entries showing the amount of each deposit made in the bank and the amount of each withdrawal from the bank. Is that true? A. No, it shows daily sales, merchandise received, general expenses and paid bills, but there is no number of the checks, or checks like you have in these old books. It only shows the amount paid * * * *they did disclose the condition of the business up until March 13, 1928.* (Italics ours.) * * * Since that time the other book is only a single entry with just the regular transactions that occurred without the detailed information.
>
> *Yes, there is a record here of merchandise purchased, of the merchandise received, general expenses, bills paid, and daily sales and an inventory."* (Italics ours.)

In this connection the bankrupt testified as follows:

> "Q. I think you were asked one question that you misunderstood, or I misunderstood you, and I

think the court did, why you kept two sets of books, and as I understand it, the Trustee's Exhibit I was not opened up until after the bookkeeper was discharged? A. That is right.

During all the time that the bookkeeper was there these three books, numbered as Exhibits II, III and IV were the only books of my business. After I discharged my bookkeeper I was not able to carry on with this set of books, that he kept, because I haven't gone through school and that is why I made it plain so as to be able to read it. I could tell when I took in $100 and would know when I paid out $75.00 from the store. I do not know enough of bookkeeping to make entries in a set of books, such as I had there at that time. When the bookkeeper left I started keeping this book Trustee's Exhibit I. Yes, I tried to put down all of the things which have occurred since the first of the year, so as to be able to tell myself and be able to ascertain to the best of my ability what my business was doing. That is right. In making up this account of sales, I used the bank deposits. I deposited every morning the following morning the day's receipts of the day before. Yes, sir, it had been my practice to deposit all money received. But if needed something I was drawing out, like I draw here—

Q. Just a moment. Did your bank deposits check with your sales, excepting where you drew out for petty cash or for your own drawings? A. I never drew any petty cash, but everything I drew was through the bank, for salary and for help, and on the first of the month, when I got my bank statement, I checked that with the book and seen that everything was correct, and then destroyed the checks.

Q. Then, as I understand it, you say your sales checked with your deposits in bank? A. Yes, sir, except—

Q. Except what you paid as petty cash? A. Yes, sir.

Q. And in making up this book, you made that book from the sales which you actually made and money actually received? A. Yes, sir.

Q. And these books reflect the actual amount you did receive from your sales? A. Yes, sir.

Q. And in making sales you sometimes sold odds and ends in job lots? A. Yes, sir, and undesirable merchandise, faded and poor stock.

Q. And is it possible that the bookkeeper did not get those? A. Many times he did not get them, because he came in once a month and there were a lot of figures that he didn't get.

Q. You kept your stubs, bills, receipts, and slips and he entered from them once a month? A. Yes, and sometimes twice a month."

And again at page 43:

"Q. What happened after you let your bookkeeper go? A. Yes, I let him go.

Q. And tell the court what happened regarding your books, what you did after letting your bookkeeper go. A. I was waiting on the trade, and I went to work and made a book showing the balance in the bank, and I entered it as cash, a cash sale, and entered all the sales, and at the end of the month I added them all together, and I paid the creditors after that as much as I could, and I had to pay my help; and I had to use for my household, because I had a sick woman in the hospital and it took more money than it did before, and every dollar I took was on the book."

"Yes, I went back and tried to enter all of my transactions since the first of the year in this single entry book. Yes, sir, the reason for that was because I was not able to understand the double entry books. Yes, sir, and because I was not able to do those books. Yes, sir, I was able to determine from the book that I kept the condition of my business; what I was doing and the amount of my money that

I was taking in and paying out for merchandise and expenses, and I had a special page for each one of those, each month. Yes, that book reflects all the transactions of my business. Yes, sir, it is as truthfully as I know how to put them down. Yes, sir, to the best of my ability I did set them out. Yes, sir, I consider that book sufficient to keep the details of my business. Yes, sir, I kept the books myself in the store there while I was waiting on the trade. I had a double store and one man stood on one side and I stood on the other side. Yes, sir, the salesmen and credit men from the wholesalers came and called on me there. Yes, sir, they saw me keeping this book. Yes, sir, at the time I went up to the Board of Trade it was not to secure an extension but was in reponse to a suggestion that I make an assignment to the Board of Trade. No, sir, I did not apply for any extension up to that time. Now, sir, at that time I did not tell them that I had all of these books and that they were intact. Mr. Johnson came to the store. Yes, sir, I did show him all of these books. If you will allow me to talk I can tell you.

Q. No, just answer the questions as I ask them. Were all those books in your place of business? A. No, they were at home; I only had one book in the store; I took all the figures out to my home, in order to enter them in that book, to keep it straight in that one book, and I never used the other books then.

Yes, sir, when the matter came up before the Board of Trade, I immediately turned those books over to the Board of Trade. Yes, sir, I instructed my attorney to allow the Board of Trade to look over the books. No, sir, I did not attempt to conceal anything."

It will thus be seen that there was ample evidence to sustain the finding of the Special Master against this objection of the appellant.

With reference to the destruction of the checks, the bankrupt testified that it had been his practice throughout

his entire business career to enter his checks in his regular books and the following month upon receiving them back from the bank to check the cancelled checks against the entries in the books and when found to be correct to destroy them. And he so testified at the first examination under 21-a, although counsel sees fit to ignore a portion of his testimony under 21-a and to quote only a few words thereof and to make a bald and unsupported claim based thereon. At page 27 of the transcript we find the following:

> "Further excerpts from 21-a examination stipulated into record:
>
> "I threw the checks in the garbage outside in the backyard and there was a man from Klein Norton's there at the time and there was nothing secret about it.
>
> Q. What was your reason for destroying them? A. I have no room in my small space.
>
> Q. Had you been in the habit of keeping your cancelled checks in the safe up to that time? A. *Yes. I have got to keep them so long, but no longer than I check up."* (Italics ours.)

He testified to the same effect many times, both at the examination under 21-a and at the hearings on the objections to the discharge. Counsel for the appellant quotes again a small portion of the testimony under 21-a where the witness says that the checks were there in February. But the witness was referring only to the checks for the previous month of January, which were received back from the bank in February.

Counsel attempts to take a few excerpts from the cold record and comments upon them without referring to or considering all of the other testimony in the case and without considering the nature of the person giving the

testimony. In the case of the bankrupt, Mr. Silverstein, while he is intelligent, yet he is without education other than that gained in the business world, and in addition was somewhat excitable and highly nervous and very often through a misunderstanding of the question or through his inability to choose the right words gave answers which, taken alone from the cold record, appear inconsistent. However, in each and every such case the witness, when given an opportunity in other portions of his testimony, both on direct and cross-examination, explained away all of the inconsistencies and it was obvious to the court and to all other persons in the court room that the witness was telling the truth in the best manner that he knew how and that his testimony in its entirety was wholly consistent, reasonable, logical and truthful. Counsel selects a few words from page 27. It is obvious that the witness, when asked his reason for destroying the cancelled checks, assumed that the question presupposed a wrongful or guilty reason, as he testified over and over again that it was his custom throughout his entire business carreer when wholly solvent, to check his cancelled checks with his books and then destroy them. It is also obvious that the word "space" as taken by the reporter was not the word spoken by the witness, but that the witness actually said "safe." The very next question which counsel for the appellant asked bears that out. Counsel asked:

> "Q. Had you been in the habit of keeping your cancelled checks in the safe up to that time? A. Yes, I have got to keep them so long, but no longer than I check up."

There was no other testimony in the record with reference to the safe and so it is perfectly obvious that the

court and counsel understood the witness to say "safe" and that the question of counsel was based upon the previous answer of the witness. The witness spoke somewhat brokenly and with a foreign accent and it was only due to the remarkable ability of the reporter that more errors of this kind did not occur in the record.

Counsel argues that the destruction of the checks is almost criminal, but he makes no mention of statements and receipts which the bankrupt received which fully took the place of cancelled checks.

Third Assignment of Error.

The arguments under this assignment have been fully answered herein, but counsel goes beyond the facts and states conclusions which are not warranted by the facts but which are entirely contrary to the facts. The record shows that before his bills were due the bankrupt went to his largest creditor and informed him of his condition, and that at the request of his creditors, and of the Board of Trade, and freely and voluntarily, and before his bills were due, the bankrupt made an assignment to the Board of Trade, turning over all of his assets and all of his books and doing everything possible to assist his creditors. If he had wanted to defraud or conceal, his course would have been directly opposite to the one taken by him. Counsel also indulges in what he calls "speculation" as to the intentions of the bankrupt with regard to his books. "Speculation" is indeed a mild term for this, as the bankrupt made an assignment before his debts were due, and bankruptcy was never at any time considered, and all of the books were kept intact and immediately placed at the disposal of the assignee, the Board of Trade.

Ninth Assignment of Error.

By this assignment appellant again attempts to interject the question of reasonable doubt and to place upon the words of the Special Master a meaning and intent not intended by the Special Master, and attempts to use this as a means of bolstering up a hopeless case. We have shown where the referee required the bankrupt to produce evidence sufficient to overthrow the effect of the testimony of the appellant and to eliminate from the mind of the Special Master any doubt as to the facts which may have arisen by virtue of the testimony of appellant. The bankrupt assumed this burden so successfully that at the conclusion of the evidence the very first words the Special Master used were: "Gentlemen: I am not at all in doubt about the findings of fact in this matter." Counsel for the appellant quotes a few excerpts from the Special Master's statement, but, as we have shown, this is not a fair way to present or argue the matter. In fairness to the Special Master we are here printing his entire statement at length. The only doubt in the Special Master's mind was as to the conclusions of law to be drawn from the findings of fact. The Special Master, after hearing all of the evidence as it came from the lips of the witnesses gave the bankrupt a clean bill of health and found without any question that the bankrupt had not committed any of the acts complained of. His statement at the final conclusion of the trial is found on page 67 of the transcript and is as follows:

> "By the Special Master: *'Gentlemen, I am not at all in doubt about the findings of fact in this matter,* but I am somewhat in doubt as to the conclusion to be arrived at from the findings.

'At the time the petition in bankruptcy was filed the claims amounted to $22,000.00. The inventory taken by the Board of Trade, which we will accept as correct, amounts to $18,115.47 of merchandise and clear fixtures amounting to $917.30, or a total of $19,485.00, approximately, that being the value of his business at the time the Board of Trade took it over; and in addition to that he apparently has real estate which is exempt I presume a homestead has been filed on it, of the value of $2850.00, and likewise, furniture of the value of $450.00, and some insurance policies amounting to about $4,000.00; but taking the real estate and household goods, which, apparently have a definite value, makes the value of the total estate $22,785.38 at the time the petition in bankruptcy was filed, which is proof that he was not insolvent at the time the petition was filed, because the exempt property must be taken into consideration under the law. Therefore, he was solvent at the time the bankruptcy petition was filed.

'The case is one that certainly does not bear the earmarks of the dishonest bankrupt who has endeavored to get all he can get out of the business and then go voluntarily into bankruptcy; this was not a voluntary bankruptcy, but was an assignment followed by an involuntary bankruptcy. The trustee was not able to uncover any assets during the many hearings we had here, and apparently there were no other assets besides those turned in.

'I am convinced that the bankrupt did not conceal or squander any of the assets of his estate, and from the testimony adduced here the estate was in very good condition and the merchandise stock was likewise in good condition, at the time the trustee took it over; the bankrupt testified that he had, on occasions prior to the assignment, for the purpose of ridding himself of out of date merchandise, and to raise money to pay his creditors, conducted sales for that purpose, and the testimony of the inventory officer bears that out to a certain extent.

'I do not believe that the bankrupt attempted to defraud his creditors by squandering or concealing any of his merchandise. (Italics ours.) On the other hand, the destroying of his checks and bank statements is a very suspicious circumstance. The Bankruptcy Act provides that failure to keep a proper set of books, unless it is properly explained, is a reason for denying a discharge. Now, has this been properly explained? The bankrupt states that it has always been his custom, when his cancelled checks were returned to him, to check over with his checks and then destroy them. It is a strange coincidence that they were scrupulously destroyed. He testified, I believe, that his wife had been in the hospital during this interim and that he had had considerable expense; it may be that some money was drawn out of the business to pay her hospital expenses, which he did not care to make a record of for fear of the effect it might have on his creditors. But the stock of merchandise was sold for $14,000.00, the total receipts being $14,167.00, and the estate will pay approximately sixty cents on the dollar after taking out the exemptions and expenses, and if he had not gone into bankruptcy or made an assignment he could probably have paid ninety cents on the dollar, and by his turning in his exempt property, which amounts to a very small portion, he was solvent.

'In view of these circumstances, I do not believe the bankrupt has done anything improper, outside probably of destroying his checks, and his failure to keep a proper set of books. He states that in order to save expenses and being hard pressed by his creditors, he discharged his bookkeeper three months prior to the turning over of the property to the assignee; that may be a satisfactory explanation. Nevertheless, there is not much of a shrinkage. I have always been inclined to hold that the hearing of objections to a bankrupt's discharge is in the nature of a criminal proceeding, and that the bankrupt is entitled to the benefit of a reasonable doubt. I am perfectly frank to say that there is doubt existing in my

mind. I will find that the books of the bankrupt were improperly kept, from a bookkeeping standpoint, but there is apparently no fraud in the case, and I am going to recommend the bankrupt's discharge by resolving the doubt in his favor.' "

ADDITIONAL ARGUMENT.

While it is true that the decisions under the amendment of 1926 are not plentiful, there are some which throw a great deal of light upon questions involved in this case. We have made a very careful search into the recent authorities and have found one very recent case; and while it is a decision of the District Court, yet the statement of the court is so direct and reasonable and logical that we quote it here and believe that this court and all of the other Federal Courts will apply the same construction to the amendment of 1926. The case referred to is the Matter of Weiner, decided by the District Court of Maryland and reported in 12 A. B. R., New Series, 651. Some of the points involved in that case was the failure to keep books of account and the burden of proof. The court says:

"The obvious purpose of the amendment is to make the law reasonable and capable of just application by the court under all circumstances on a given case by providing that a discharge shall not be granted unless the court in its own discretion deems a failure to keep books of account or records from which the bankrupt's financial condition might be ascertained, to have been justified. In short, while the court is given broader discretion in one sense under the law as amended, as respects the bankrupt, the change may be said to make the requirements just as strict. Mitigating circumstances, if they actually existed, may be taken into account to avoid depriving an honest debtor of his discharge, but the court

should be entirely satisfied with respect to these mitigating circumstances."

It is true that in this case the Special Master did refer to the fact that the bankrupt was solvent at the time he made the assignment to the Board of Trade, but this fact was only one of the circumstances which the court was authorized to consider in determining the veracity of the bankrupt, and the weight to be given his testimony and the presence or absence of fraud or intent to defraud.

This court has also had occasion to construe the 1926 amendment. See Matter of Merritt, *supra,* and Bockus v. Yuen, 29 Fed. (2) 205. In the latter case this court said:

> "Suffice it to say that we agree generally with the Circuit Court of Appeals for the 6th Circuit that the Bankruptcy Act should be liberally construed in favor of the right of discharge and that the doubt which the language of the original act gave rise to should be resolved in his favor."

Conclusion.

In conclusion we merely want to correct a statement of the appellant in his conclusion to the effect that "the creditors were vigilant enough to throw this debtor into the bankruptcy court before he had a chance to get away with all of his stock." As previously pointed out, and as pointed out by the Special Master, the debtor, before his debts were due and while he was solvent, freely and voluntarily, at the suggestion of his creditors, and their agent, the Board of Trade, made an assignment of all of his assets to the Board of Trade for the benefit of all of his creditors. No bankruptcy was contemplated or intended and had the matter been properly handled by the Board

of Trade and the creditors the creditors would have received one hundred cents on the dollar. They elected instead to sell the assets at forced public auction at prices much below their value and based upon a false and incorrect inventory. The loss, if any, is not due in any way to any act of the bankrupt and the bankrupt, instead of being penalized, is to be commended for his fair, honest and upright dealings with his creditors. He stepped out without a dollar in the world except an equity in his home, when, had he been fraudulently inclined, he could have remained in possession for a considerable time and taken and used for his own purposes the moneys derived from the sale of the merchandise. The strenuous objections of the trustee to the discharge and this appeal have been entirely unreasonable, and unwarranted and have amounted almost to persecution and oppression resulting only in further expense and loss to the creditors. We know that this court will agree that the bankruptcy act contemplates no such treatment of a bankrupt who has acted only in the highest of good faith and has in no way been guilty of any act condemned by the Bankruptcy Act. We respectfully submit that the findings and report of the Special Master and the order of the District Court approving the same and granting the discharge should be affirmed.

Respectfully submitted,

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